Testimony of Celeste Monforton, MPH, DrPH
before the U.S. Senate Committee on Health, Education, Labor & Pensions
Subcommittee on Employment and Workplace Safety
"Introducing Meaningful Incentives for Safe Workplaces and Meaningful Roles for Victims and Families"

April 28, 2009
International Worker Memorial Day

Senator Murray, Senator Isakson and other members of the subcommittee:

I am Celeste Monforton, an assistant research professor in the Department of Environmental and Occupational Health at the George Washington University School of Public Health & Health Services, and chair of the Occupational Health & Safety Section of the American Public Health Association. I appreciate the opportunity to appear before you today to discuss occupational health and safety policy, including:

- Using civil penalties to censure employers who disregard their legal and moral responsibility to provide a healthy and safe workplace;
- Remodeling the OSHA penalty system to spur implementation of worksite-specific illness and injury prevention programs; and
- Promoting avenues for meaningful participation in OSHA's citation and penalty process by current workers, injured workers and family-member victims of workplace hazards in order to address the social consequences of worker injuries, illnesses and death as well as the economic and legal factors that dominate the current OSHA system.

Today, people around the globe are marking Worker Memorial Day, the day set aside to remember workers killed, disabled, injured or made unwell by their work, and to act to improve protections for the world's workers. In our own country, we can honor the men, women and young workers whose lives were cut short or irreparably harmed by on-the-job conditions by making needed changes to our nation's occupational health and safety system.

Ultimately, our nation's health and economy would be served best by an occupational health and safety regulatory system that emphasizes prevention of work-related injuries and illnesses. The topic "prevention of occupational injuries and illnesses" could be the subject itself of entire subcommittee hearing, but one piece of prevention — penalties — is the topic for today.

In a regulatory system like OSHA's, penalties must be severe enough to compel violators to change their behavior, and to deter lawbreaking by those who might be tempted to flout safety and health regulations in an effort to increase production or cut costs.

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Davitt McAteer, former Assistant Secretary of Labor for Mine Safety and Health, notes that employers (and individuals) generally fall into three categories. One group is the top performers: companies that strive for operational excellence. They don't worry about OSHA inspections;

they already have worker injury and illness prevention programs that are grounded in employee involvement and continuous improvement and, frankly, put OSHA's bare-minimum regulations to shame.

At the other end of the spectrum are the bad actors. These individuals intentionally disregard the law or are indifferent to it – they act as though the rule of law doesn't apply to them. Unfortunately, there are employers who fall into this category. These are employers who violate the law, without care or concern for the individuals or communities potentially affected by their decisions. They flout rules designed to protect our air, water and other natural resources, defy minimum wage and overtime rules and collective bargaining rights, and ignore workplace health and safety standards. Employers in this category deserve to get the book thrown at them – not just the book, the whole book shelf.

Our occupational health and safety (OHS) regulatory system must provide harsh penalties for employers who fall into this category. The system should require the equivalent of "points on their permanent record." Employers who flagrantly, willfully or repeatedly violate laws designed to protect workers from injuries and illnesses should see their finances and reputations suffer. Our system should take advantage of the times when such employers are caught, and capitalize on these grievous situations for their value as a deterrent for companies nationwide. It may not deter other bad actors, but it will catch the attention of those who might be tempted to cut a few corners when under pressure.

The majority of employers and the majority of people in general are neither stellar performers nor bad actors. We respect laws' aims and purposes, and we comply with them – most of the time. At times, however, competing forces color our judgment, and we break a rule because we think the likelihood of causing harm is low, as is the risk of getting caught. I'm going to make a confession: a time or two I've run through a traffic light as it turned red. Did I know I was breaking the law? Yes. Did I do it intentionally? Yes. Were there extenuating circumstances? Yes, but regardless, I violated a traffic law.

I was probably running late for an appointment, and made a risk calculation that considered the chances of causing an accident and the chances of getting caught by the police, with the benefits of making it to my appointment on time. I obey traffic safety rules nearly all of the time, but on occasions, I used bad judgment. Do I deserve an appropriate penalty? Yes. If the penalty is stiff enough (i.e., a steep fine and points on my driver's license), will I think twice before running a red light again? You bet.

I believe that many employers and their managers act similarly when it comes to OHS rules. They know that workplace OHS standards are based on lessons learned and have a public health and safety purpose. But, from time to time, when certain competing forces weigh on them, they make a calculation. They weigh the risk of suffering harm or causing harm to another and the likelihood of getting caught breaking the law. Whether it is my late-for-an-appointment red-light running analogy, or a manager's decision to allow Joe Laborer to work on inadequate scaffolding because they're running behind schedule and Joe Laborer will only be up there a few minutes, competing forces (e.g., production goals, time constraints, economics, competitors) influence our judgment. The deterrent effect of OSHA's penalty system could be amplified to outweigh the influence of competing forces. This is particularly relevant today; the U.S. needs an effective

system to prevent occupational injuries and illnesses, but OSHA's responsibilities are grossly mismatched with its budget and resources.

OSHA Civil Penalties and the Deterrent Effect

A penalty's effectiveness as a deterrent is influenced, in part, by its economic impact on the individual or entity that pays it. With respect to OSHA's civil penalties, many employers will make a practical calculation to assess economic factors such as:

- the cost of implementing safety and health interventions (e.g., purchase and maintenance of equipment, continuous worker training);
- the cost savings associated with foregoing safety and health interventions (e.g., delaying equipment maintenance for another few months);
- the benefits to safety and performance of the intervention; and
- the potential financial cost of an OSHA citation and penalty (e.g., monetary fee, human resource time corresponding with OSHA, legal services).

These economic costs are weighed against the likelihood of having an inspection and being cited for OHS violations.

The present OSHA enforcement system ignores, however, the potential role of reputational damage in enhancing the deterrent effect of OSHA penalties. For many firms, the average OSHA penalty for a serious violation is just a rounding error in their overall budget. If the firm's customers learn of its violations and then decide to take their business to competitors, however, the firm could suffer a penalty much larger than an OSHA fine. Companies value their reputations, which are built on the quality of their products and services and their relationships with the communities in which they operate. By making violation information available to the public and press, OSHA could demonstrate to companies that OHS violations put their reputations at risk. For example, OSHA could make prominently available and easily searchable on its website items such as the following:

- details of a fatality or serious injuries or illnesses among the company's employees or contractors;
- evidence that the company's management allowed employees to be exposed to serious safety or health hazards, or knowingly violated OHS standards; and
- data depicting the company's nationwide inspection history, violations cited, performance in abating hazards promptly, and history of contesting citations and penalties.

OSHA could use its website much more effectively to make workers, competitor businesses and the public much more aware of companies who have violated worker protection laws. The agency should also explore what other tools it has at its disposal to ensure that the public and the press can take workplace OHS data into effect when they evaluate companies' reputations.

The final major factor influencing the deterrent effectiveness of a penalty system is the likelihood of enforcement – that is, the probability of getting caught exposing workers to OHS hazards. With respect to OSHA's presence in workplaces, the facts are well-known: there are about 8.97 million workplaces nationwide,[1] and in 2007, the federal and state OSHA programs combined conducted 96,704 inspections. A substantial portion of these (about 40%) were conducted in response to fatalities and catastrophes, employee complaints about hazardous conditions and referrals. Less than 1% of non-mining workplaces were visited last year by federal or State OSHA inspectors.

I've developed a model I'm calling the "Deterrent-Effect Matrix" (Figure 1) to evaluate the potential capability of a penalty system. Using the matrix to examine the current OSHA penalty system, I'd classify it as "inadequate" as a deterrent. On the y-axis, the probability of having an inspection is low; on the x-axis, the economic cost of an OSHA civil penalty is low (i.e., *initial* assessed penalty for a serious violation is $1,400) and the risk of reputational damage is also low. Modifications to one or both axis-factors are needed to transform OSHA's penalty system into one with a sufficient deterrent effect.

Figure 1: Deterrent-Effect Matrix

	Economic and Reputation Cost of the Penalty (Monetary Penalty, Damage to Reputation)		
Likelihood of Enforcement (Probability of Getting Caught Violating the Law)	**High**	**Medium**	**Low**
High	+++++	++++	+++
Medium	++++	+++	++
Low	+++	++	+

Legend		Degree of Deterrent Effect
+++++	=	Robust
++++	=	Significant
+++	=	Modest
++	=	Trivial
+	=	Inadequate

In contrast, I'd classify the penalty authority given to the U.S. Environmental Protection Agency as "significant" or "robust." Under the Clean Water Act and Clean Air Act, for example, there are requirements for continuous monitoring and the initial penalty for violating emission and discharge standards is typically $25,000 per violation per day.[2] In this case, the likelihood of enforcement and the economic cost of the penalty are both in the medium to high range. Moreover, under EPA policy, the penalty amounts assessed to companies are supposed to take into account the economic benefit the firm gained from not complying with the law. As noted in a 1992 GAO report,

> "…allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage, which creates a disincentive for compliance. EPA's policy is to remove the incentive to violate the law."[3]

This particular GAO report was not, however, about EPA; rather, it was an assessment of how well OSHA had implemented the 1991 Congressional mandate increasing OSHA penalties. In this GAO report "OSHA: Penalties for Violations are Well Below Maximum Allowable Penalties," the auditors recommended that the economic benefits reaped by an employer for violating health and safety regulations should be a specific factor included in OSHA's penalty calculation. I suspect that firms that have invested in progressive, effective worker health and safety programs would welcome a penalty system that levels the playing field. Employers who comply and embrace the letter and the spirit of OHS regulations should no longer be placed at an economic disadvantage because their competitors are failing to invest in OHS.

Finally, the OSHA enforcement system does not operate in a vacuum. I urge this Committee to consider its deterrent effect in conjunction with other related social institutions: the independent Occupational Safety and Health Review Commission (OSHRC) and our state-based, exclusive remedy workers' compensation system. I offer recommendations about these institutions at the end of my testimony.

Delinking Citations and Penalties with Abatement of Hazards

Law-abiding employers are not the only ones put into a difficult position by OSHA's inadequate response to violations. Because of the way the OSH Act is written, local OSHA managers often have to choose between levying a tough penalty and getting a hazard corrected quickly. Under the OSH Act, employers are not required to correct a hazardous condition(s) until the citation(s) assessed by an OSHA inspector becomes a final order of the OSHRC.[4] Briefly, when an employer receives an OSHA citation and penalty, s/he has 15 working days to (1) accept the citation, abate the hazards and pay the penalties; (2) schedule an informal conference with the local OSHA area director to negotiate an informal settlement agreement; or (3) formally contest the citation and/or penalty before the OSHRC.

An employer has the right to contest four aspects of the citation: (1) the classification of the violation (e.g., serious, willful); (2) the OSHA rule, standard or statutory clause affixed to the violation; (3) the abatement date; and/or (4) the proposed penalty. Instead of formally contesting one of these aspects, an employer may request to meet with the director of the local OSHA office for an informal conference before the 15-day period to file a notice of contest expires. The majority of employers who receive OSHA citations participate in informal conferences, and the majority of OSHA inspection cases are resolved this way. OSHA's area directors have the authority to reclassify violations (e.g., downgrade from willful to serious, serious to other-than serious); withdraw or modify a citation, an item on a citation, or a penalty; and negotiate the proposed penalty. If both parties agree to the negotiated terms, the employer must then abate the hazard in the agreed upon time period; if no agreement is reached, the employer will likely choose to formally contest it through the OSHRC system and can refrain from correcting the safety problem in the meantime.

When cases move through the OSHRC system, the administrative law judges and Commissioners typically reduce the penalty amount proposed by OSHA. (OSHA proposes a penalty amount, but the OSHRC determines the final penalty.) In practical terms, when a citation is contested, years and years can pass before an employer can be compelled to abate the workplace safety or health problem. Even if the employer doesn't succeed in their OSHRC appeal, they have bought substantial time (and saved money) by not correcting the hazard during the appeal process. Furthermore, by holding in abeyance the correction of hazardous conditions, these employers have gained an economic advantage over their competitors, employers who do obey OSHA standards and regulations.

OSHA's area directors offer penalty reductions and reclassifications of citations (e.g., from serious to other-than-serious) in order to compel prompt correction of the hazard. From a local OSHA manager's perspective, s/he would rather get the dangerous situation rectified so that workers at the site are protected from potential harm, rather than risk a chance that the employer will contest the citation and penalty.

OSHA's inspectors and local managers are truly in a difficult position because the citations and penalties are linked to hazard abatement. Compare the situation of OSHA inspectors and supervisors to that of their colleagues at the Mine Safety and Health Administration (MSHA). Under the Mine Act, when a federal mine inspector identifies a violation of an MSHA standard or regulation, mining companies are required to begin fixing the problem immediately. Employers in the mining industry have the right to challenge citations and penalties before the Mine Safety and Health Review Commission (MSHRC), but an employer's decision to litigate an inspector's finding and/or the proposed penalty does not give him permission to let workplace hazards persist. OSHA needs comparable authority.

The principle of prevention must be enshrined in our workplace OHS regulatory system. This means providing OSHA the authority to compel immediate abatement of hazards that are known to contribute to serious injury, illness or death. We can't make advances in <u>preventing</u> harm to workers when our system forces local OSHA staff to bargain with employers for worker protections that they are already <u>required</u> to implement. The informal settlement process should not only expedite abatement of the hazard, but also give OSHA leverage to require employers to implement measures that go above and beyond what is required by OSHA.

I envision a transformed OSHA penalty system that would offer a more significant deterrent effect and would provide incentives for employers to enhance their OHS systems beyond the bare-minimum OSHA requirements. For example, modest reductions in the penalty amount could be reserved exclusively as a negotiation tool to compel abatement of other-than-serious violations. (As noted above, immediate abatement should be required for a class of hazards known to contribute to serious injury, illness or death.) In order for an employer to secure a reclassification of a violation (e.g., from serious to other-than-serious), the firm would be required to implement a meaningful worker injury and illness prevention measure at their worksite (e.g., a worker-involved hazard identification and correction program). Likewise, if an employer sought a reclassification of a willful violation to a serious violation, the firm would be required to implement a comprehensive health and safety management system, or would be required to implement a meaningful and verifiable intervention at all of the firm's locations.

The pragmatist in me recognizes that making such changes to the current penalty system is likely to increase the number of citations and penalties that are contested. That's true. In fact, MSHA staff tell me that since the agency's penalties were increased substantially in April 2007, the contest rate has quadrupled.* In order to temper employers' race to the courtroom (which would be a windfall for attorneys who specialize in employer OHS defense), OSHA could capitalize on the reputation costs to firms of OHS violations, by making accessible to the public in a searchable format data on employers' specific violations, informal settlement demands, contest history, etc. Potential employees, communities, competitors and the press should have access to employer-specific data, to make an assessment for themselves about a firm.

Mandatory Minimums for Exposing Workers to Well-Known Extreme Danger

An examination of occupational injury, illness and fatality data shows that the same hazardous conditions that killed and maimed U.S. workers 20 years ago are largely the same hazardous conditions that kill or maim U.S. workers today. In 2009, in the richest nation on earth, there is no acceptable reason why workers still suffocate to death in unshored trenches. Trench collapses are preventable: the methods are well-established, and the equipment inexpensive and available. Yet last year, at least two dozen workers in our nation died this way. Likewise, workers in the U.S. continue to die or be seriously maimed on the job from falls on residential construction site projects or because of unguarded equipment, inadequate lock-out/tag-out procedures, and uncontrolled combustible dusts and gases.

Isn't it time that we, as a nation, proclaim that certain hazardous conditions in workplaces are not tolerated? Just as drunk drivers now receive hefty legal penalties and scorn from their peers, employers should pay dearly for allowing workers inside an unshored trench, permitting unguarded floor openings, tolerating inoperable safety devices and sending workers into confined spaces without proper training and equipment.

Congress should direct OSHA to publish a list of specific hazardous conditions or work practices that will be deemed automatic willful violations. Citations issued under this provision would not be eligible for reclassification and would remain on the company's enforcement history record for a minimum of ten years. This congressional mandate would include a requirement for OSHA to update the "automatic willful" list biennially.

Inadequate Statutory Minimum and Maximum Penalty Amounts

In 1991, after 20 years on the books, Congress amended Section 17 of the OSH Act, authorizing OSHA to assess no less than $5,000 but no more than $70,000 for a willful or repeated violation, and up to $7,000 for serious, other-than-serious and posting violations.[5] It's time for another congressional update of OSHA's minimum and maximum penalty amounts, along with a mandate for OSHA to index them regularly to account for inflation.

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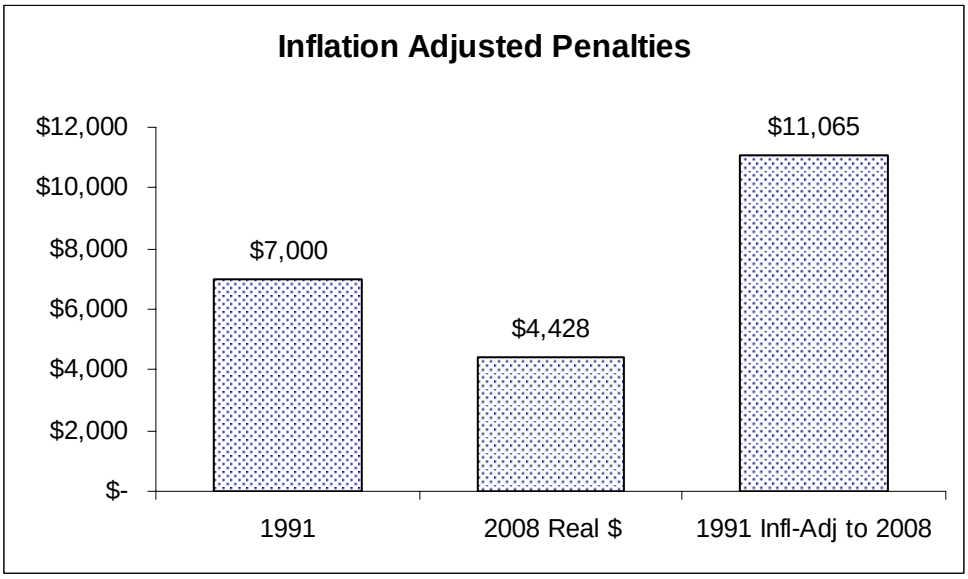
* Recall however that contesting an MSHA citation does not absolve the mine operator from abating the hazard. This substantial jump in contested cases is a resource and management problem, but has far less significance for workers' immediate health and safety.

Figure 2 shows the inflation-adjusted equivalent of $7,000, the current maximum for a serious violation. In today's dollars, this maximum penalty—which, by the way, is rarely proposed by OSHA—has eroded to $4,428. If indexed to inflation, the $7,000 maximum would now be $11,065.

Figure 2: Inflation-Adjusted Maximum Penalty for Serious Violation



Under the OSH Act, OSHA proposes the penalty amounts and the OSHRC assesses them through a final order. Within the minimum-maximum structure established by Congress in 1991, OSHA and OSHRC are also required by statute to consider four factors when determining the penalty amount:

(1) the size of the business;
(2) the gravity of the violation;
(3) the employer's good faith; and
(4) the employer's history of previous violations.

The gravity of the violation, assessed in terms of the severity and the probability that an injury or illness could result from it, is the primary consideration in determining the penalty amount. This gravity-based penalty amount ranges from $2,000 to $5,000,[6] from which OSHA considers percentage reductions for the remaining three factors.[7] For example, a firm with 1-25 employees nationwide will typically receive a 60 percent reduction off the gravity-based penalty amount; for an employer with 26-100 employees or 101-250 employees, typical business-size reductions are 40 percent and 20 percent, respectively.

Congress should reset these penalty amounts and express its intent on how the statutory reduction factors should be applied. OSHA's current operations manual, for example, directs inspectors that the starting point for serious violation is $5,000, not $7,000 as authorized by Congress.[6] In addition, the Department of Labor (that is, OSHA and the Solicitor's Office) should be prohibited from using the so-called "Section 17" designations to make willful and repeat violations disappear.[8] They use this reclassification scheme even in the case of a worker's death or maiming. This practice poisons the potential deterrent effect of OSHA citations, and improperly allows a firm to preserves its reputation. The lawyers who negotiate these deals with OSHA on their employer-clients' behalf know a firm's bottom line is contingent on its reputation—a precious commodity in the business world. Most employers who receive willful or repeated violations from OSHA will pay almost any monetary fee to get a "Section 17" designation. Ultimately, these designations convey that their grievous violation of worker protection standard never occurred. By contrast, the families of workers maimed or killed on the job cannot pretend it never happened.

Finally, Congress should consider the 1992 recommendation by GAO in their report examining OSHA penalties, specifically, that the economic benefits reaped by an employer for violating health and safety regulations should be a specific factor included in OSHA's penalty calculation.[3]

Amplify the Prevention Potential of OSHA Citations

Forty years ago, when businessmen needed sales, production or other information from factories or construction sites across the country, secretaries used shorthand, typewriters and carbon paper to prepare memos. The U.S. Mail was the communication messenger. Businesses today have data at their fingertips, and with the click of a mouse can share critical information with their facilities across the county and the globe. With the power of this instantaneous communication, it's time to capitalize on the prevention potential of OSHA citations. For example, if a serious hazard or violation of a workplace standard is identified in an employer's workplace, that company should be expected to look for this same hazard in all of its other operations, once it has been put on notice that the hazard exists. With 21st-century communication tools at their fingertips, businesses are well equipped to correct hazards and strengthen prevention programs across all of their sites.

The OSH Act places a duty on employers to provide safe and healthy workplaces,[9] but it imposes no obligation on them to address hazards on a company-wide basis. Congress should mandate such a duty on large companies. When a serious hazard has been identified by OSHA at one facility, the firm should be required to conduct an audit to determine whether the same hazard exists at other facilities. If comparable hazards or violations are found at another site, citations for those violations should be classified using the new category of "reckless disregard." The corresponding civil penalty should be hefty (e.g., $220,000 as provided in the MINER Act of 2006.)[10]

Meaningful Roles for Victims and Families

In the wake of the January 2006 Sago mine disaster, I had the privilege to serve on the special investigation team appointed by West Virginia Governor Joe Manchin. Through that experience, I came to understand and appreciate the fundamental right of family-member victims to have a meaningful role in formal accident investigations, and the vital contribution that they can make to the process. There is no one more interested in finding the truth about the cause of an on-the-job death than a worker-victim's loved ones.

I heard then, and still hear today, proponents of the status quo argue that family members will impede the investigation, that family members have a conflict of interest, or that family members are too emotional to be useful in the fact-finding. My experience with the Sago families tells me that nothing is further from the truth. Yes, the logistics were more complicated managing the needs of 12 different families, and yes, many times our interactions were heart-wrenching, but no one paid closer attention to details, pressed the federal and state investigators harder for answers, or raised the bar for mine safety reforms higher than those daughters, wives and brothers.

Of the many memorable experiences, one in particular stands out as relevant to our purposes today. For many weeks following the disaster, MSHA and State investigators conducted closed-door interviews with the miners who escaped after the explosion, mine rescue team members, other mine workers and management officials. More than 70 private interviews were conducted, and investigators collected supporting documents used during the interviews (e.g., mine maps, pre-shift examination records, etc.). What do you think happened as soon as these interviews commenced? Understandably, the families wanted to know who was being interviewed and what the investigators were learning. From the prudent perspective of the investigators, they will not typically share any information until the investigation is completely closed, and this had historically been MSHA's firm practice. At the same time, the family members yearned to learn as much as they could about their loved ones' final hours.

Putting oneself in the family members' shoes, you realize that dozens of people (people you don't know and have never met) are learning the circumstances that led to your loved one's death, but you—his parent, his wife, his child—are left in the dark. As I talked with family members in the early days of the Sago investigation, as these interviews were first taking place, I realized that we needed to balance the families' right to know with the needs and the legal responsibilities of technical investigators. In an unprecedented move, we quickly identified a compromise. It was not perfect, but it served both goals: once all the witness interviews were completed, but well before the investigation was closed, we gave each family a complete set of the transcripts and supporting documents. Despite the unease and anxiety expressed by some, including the historically based assertion that such disclosures would impede the investigation, no calamity ensued. In fact, some of the family members devoted long days and nights to studying the transcripts and were able to alert us to inconsistencies in witnesses' testimony and identify topics deserving closer scrutiny. In my professional life, my involvement with the Sago investigation and the families has been one of the most rewarding and enlightening experiences in my public health career.

In my recommendations listed below, I offer several suggestions to provide fundamental rights to family-member victims of serious workplace incidents and opportunities for their meaningful participation in incident investigations.

Recap and Recommendations:

Family-Member Victims of Workplace Fatalities and Catastrophes

1. I respectfully suggest that Members of the Committee read "Workplace Tragedy: Family Bill of Rights,"[11] a document prepared by family members who have lost loved ones to workplace disasters. It contains powerful examples of how the current enforcement system ignores the needs of family-member victims. I concur with the spirit of many of its recommendations.

2. The Secretary of Labor should appoint a federal advisory committee made up of injured workers and family-member victims of workplace fatalities and catastrophes, to give SOL, OSHA and MSHA officials advice on improving the prevention potential of the enforcement and accident investigation systems. The advisory committee would provide a mechanism for senior DOL officials to interact with individuals who have personal knowledge and interest in achieving substantial improvement in our nation's injury and illness prevention system.

3. Victims' family members or their designated representative should have status equal to that of employers in OSHA and MSHA investigations of fatalities and catastrophes.

4. Family members should be given access to all documents gathered and produced as part of the accident investigation, including records prepared by first responders and state and federal officials, and all fees related to the production of documents should be waived for family members. The release of this information should be prompt, and no later than the day that any citations are issued to the employer. Exceptions should be permitted when bona fide evidence demonstrates that a criminal investigation could be hampered by such release.

OSHA's Civil Penalty System

5. Congress should give OSHA the authority to compel abatement of hazards regardless of an employer's decision to contest a citation and/or penalty. Moreover, reclassification of citations (e.g., from serious to other-than-serious) should be reserved for circumstances in which the employer agrees to implement an intervention that goes above and beyond mere compliance with an OSHA standard.

6. OSHA should capitalize on the reputation costs to employers who violate OHS standards by making workers, competitor businesses and the public much more aware of companies' OSHA enforcement history. This would entail offering a web-based system with data on employers' specific violations, informal settlement demands, contest history, etc.

7. Congress should direct OSHA to publish a list of specific hazardous conditions or work practices that will be deemed automatic willful violations and that will not be eligible for "Section 17" designations or other reclassification by OSHA.

8. Congress should reset the current statutory minimums and maximums for OSHA civil penalties and mandate that OSHA index them regularly to account for inflation.

9. OSHA's penalty calculation should include a specific factor that assesses the economic benefits reaped by an employer for violating health and safety regulations, which will level the economic playing field for firms that invest in progressive, effective OHS labor-management systems.

10. Congress should impose an obligation on large firms to address hazards on a company-wide basis, once they have been identified by OSHA at one of the firm's facilities. A new category of violation, "reckless disregard," should be created for employers who fail to use an OSHA citation as notice of a hazardous condition to be corrected elsewhere.

Occupational Safety and Health Review Commission

11. Congress should examine the impact on our workplace injury and illness prevention program of OSHRC's decisions and administrative performance. Some cases before the OSHRC languish there for years (e.g., the April 2009 decision in *Secretary of Labor v. E. Smalis Painting Co.*, dating back to a 1993 inspection), and these delays likely have a downstream effect on OSHA's enforcement practices.

12. Congress should examine whether OSHRC's resources are sufficient to ensure speedy resolution of disputed citations; indecision and delay at OSHRC obstruct the potential deterrent effect of OSHA citations and penalties. Appendix A presents data on the number of cases received and disposed of by OSHRC in recent years.

13. Congress should direct OSHRC to provide more information on its public website about pending cases. This could be a simple electronic spreadsheet with data fields such as case number, employer, worksite location, date of OSHA citation, status of litigation, date of final decision and the URL for the final decision text. Making this information available increases the likelihood that frequent and severe offenders will suffer deserved reputational damage.

State-Based Workers' Compensation System

14. Congress should reauthorize for a two-year period the National Commission on State Workers' Compensation Laws. It has been almost 40 years since the Congress has examined the adequacy and effectiveness of these laws for occupational injury and illness prevention. As the Administration and Congress move forward on proposals to improve our healthcare delivery and financing systems, it would be appropriate for the debate to include an informed assessment of state workers' compensation laws.[12]

References

[1] U.S. Bureau of Labor Statistics. Table 1 "Total coverage (UI and UCFE) by ownership: establishments, employment and wages, 1998-2007, annual averages, BLS establishment data" Available at: http://www.bls.gov/cew/ew07table1.pdf

[2] Grad FP. The Public Health Law Manual, 3rd ed. Washington, DC: American Public Health Association, 2004. See Chapter 11 "Civil Sanctions."

[3] U.S. General Accounting Office. Report to the Subcommittee on Health and Safety, Committee on Education and Labor, U.S. House of Representatives. Occupational Safety and Health: Penalties for Violations are Well Below Maximum Allowable Penalties," April 1992.

[4] Section 10(b) of OSH Act.

[5] H.R.5835, Omnibus Budget Reconciliation Act of 1990 (Enrolled as Agreed to or Passed by Both House and Senate).

[6] OSHA's Field Operations Manual states, "if the Area Director determines that it is appropriate to achieve the necessary deterrent effect, a GBP of $7,000 may be proposed instead of $5,000. Such discretion should be exercised based on the facts of the case. The reason for this determination shall be fully explained in the case file." OSHA's Field Operations Manual, CPL 02-00-148, March 26, 2009. Pages 4-5, 4-6. Available at: http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf at.page 6-6.

[7] OSHA's Field Operations Manual, Chapter 6: Penalties and Debt Collection.

[8] U.S. Senate. Committee on Health, Education, Labor and Pensions. "Discounting Death: OSHA's Failure to Punish Safety Violations that Kill Workers," April 29, 2008.

[9] Section 5(a) of OSH Act.

[10] Under the Miner Act of 2006, Congress created a new violation category called "flagrant" representing "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." A civil penalty of up to $220,000 can be assessed. Since the law was passed, MSHA has used the "flagrant" classification 92 times with assessed penalties totaling $14,552,400.

[11] "Workplace Tragedy: Family Bill of Rights" available at: http://www.usmwf.org/
[12] See also: Woeppel P. Depraved Indifference: The Workers' Compensation System. IUniverse, 2008.

Appendix A:
Occupational Safety and Health Review Commission Performance Measures

	ALJ Decisions				Commission Decisions			
Fiscal Year	Cases Carried Over from Previous Year	# New Cases	# Cases Disposed of	Balance for the Next Year	Cases Carried Over from Previous Year	# New Cases	# Cases Disposed of	Balance for the Next year
2008	625	1,962	1,848	736	25	13	18	20
2007	685	1,998	2,058	625	27	25	27	25
2006	nr	nr	nr	nr	40	13	26	27

nr = not reported

Percentage of Cases Over Two Years Old Disposed Of

Fiscal Year	% of Cases
2008	23
2007	32
2006	22
2005	52
2004	42

Source: Occupational Safety and Health Review Commission. Performance and Accountability Reports. Available at: http://www.oshrc.gov/performance/performance.html